BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CRAIG S. NACHBAR Claimant VS. **STANLEY STEEMER CARPET CLEANERS** Respondent AND **MARYLAND CASUALTY COMPANY** Insurance Carrier AND **KANSAS WORKERS COMPENSATION FUND**	)	Docket No. 157,750

ORDER

Respondent appeals requesting review of an Award entered on April 25, 1994, by Administrative Law Judge Robert H. Foerschler. The Appeals Board heard oral argument by telephone conference.

APPEARANCES

The respondent and its insurance carrier appeared by and through their attorney, Clifford K. Stubbs of Lenexa, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, James E. Phelan of Kansas City, Kansas. The claimant appeared not as he had previously settled his claim with the respondent.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the April 25, 1994 Award.

ISSUES

The only issue remaining in this case is the extent, if any, of the liability of the Kansas Workers Compensation Fund. Respondent requests Appeals Board review of this single issue.

The claimant previously settled his claims against the respondent on December 30, 1992.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the evidentiary record and hearing arguments of the parties, the Appeals Board finds as follows:

In a settlement hearing held on December 30, 1992, the claimant and the respondent settled claimant's workers compensation claims for accidental injuries occurring on July 21, 1990, and December 3, 1990. Respondent had previously impled the Kansas Workers Compensation Fund (Fund) in regard to the December 3, 1990 accident which is the subject of this docketed case. Respondent alleged that the July 21, 1990 accident either was the direct cause or contributed to the December 3, 1990 injury. As such, the Fund could be liable for a portion or all compensation benefits paid as a result of this accident.

Claimant was first injured while working for the respondent on July 21, 1990, when he was involved in an automobile accident. Claimant was driving a company van that hit a guard rail injuring the claimant's neck. At first, the claimant was treated for his neck injury at Humana Hospital emergency room and then by Dr. Paul Burger, his family physician. The injury left the claimant with a sharp pain in his neck and shoulder area. He was off work for three (3) weeks and then was released by Dr. Burger to return to work.

However, after the claimant returned to work he suffered continuing pain in his neck which gradually worsened. He remained under the care of Dr. Burger, who prescribed anti-inflammatory and muscle relaxant medication. Claimant established through his testimony that he told his manager, George Noland, of his doctor's appointments and treatment. He further testified he notified the manager that his neck pain was getting worse.

On December 3, 1990, claimant was cleaning a carpet at an empty house with a fellow worker when he felt a pinch in his neck. He was unable to continue working because of the severe pain. Claimant immediately notified the respondent by a two-way radio of his problem. Because of the pain, he had to lay down until his helper finished the job.

The only medical evidence presented by either the respondent or the Fund is a medical report dated March 27, 1992, from Edward J. Prostic, M.D., an orthopedic surgeon in Kansas City, Missouri and Dr. Prostic's evidentiary deposition taken on June 8, 1993. Dr. Prostic examined the claimant and had the benefit of prior medical records regarding claimant's previous medical treatment. Dr. Prostic found, with respect to the claimant's July 21, 1990 accident, that claimant received conservative treatment from his family physician. After the second accident, claimant's condition was treated by Dr. Robert Tenny, a neurosurgeon, who found a C6-C7 disc protrusion centrally and to the right. On December 21, 1990, Dr. Tenny performed a right C6 partial hemilaminectomy and excision of the extruded disc. Claimant was returned to work for the respondent in March of 1991. Dr. Prostic opined, in accordance with the AMA Guides, that the claimant as a result of

both of his work-related injuries sustained a twenty percent (20%) permanent partial functional impairment to the body as a whole. It was Dr. Prostic's opinion that the first accident, July 21, 1990, caused permanent injury in the amount of five percent (5%) permanent functional impairment.

In answer to a question as to whether the claimant, after his first injury, was a handicapped employee, Dr. Prostic answered in the affirmative. Dr. Prostic also testified that in his opinion it is unlikely that the claimant's disc herniation that occurred subsequent to his second injury of December 3, 1990, would have occurred but for his preexisting disc disease.

The Administrative Law Judge's Award does not list as part of the record the deposition of David J. Beckett, branch manager of the respondent where the claimant was employed, which was taken by the respondent on August 2, 1993. Mr. Beckett did not take over management of that branch, however, until February of 1991, after both of the subject accidents occurred. During oral argument before the Appeals Board, the parties agreed that the deposition should have been a part of the evidentiary record. During the deposition, the Fund objected to this testimony on the basis that it was hearsay testimony. After a review of that deposition, the Appeals Board agrees with the Fund and finds that the majority of the testimony should be disregarded as unsubstantiated hearsay testimony as the deponent only testified to what he knew from personnel records not admitted into evidence. Additionally, deponent's testimony also contained what the prior manager had told the deponent concerning claimant's injuries. Therefore, the Appeals Board will not remand this case to the Administrative Law Judge for clarification as to whether he considered this deposition when he rendered his decision since the testimony contained therein is hearsay and should not be considered as evidence in this proceeding.

The Administrative Law Judge found that liability in this case should be apportioned fifty percent (50%) to the Fund and fifty percent (50%) to the respondent. The Administrative Law Judge reasoned that there is hazy evidence in the traditional sense as to whether an accident occurred on December 3, 1990. Also, he found that the Fund should only be required to pay for the second injury, not the first injury.

The Fund argues that the respondent did not meet its burden of proof that it knowingly retained a handicapped employee and that claimant's resulting disability would not have occurred but for his preexisting permanent impairment. The respondent is required to prove by a preponderance of the credible evidence that it knowingly employed or retained a handicapped employee, in order to be relieved of liability or be entitled to an apportionment of an award of compensation from the Fund. See K.S.A. 1990 Supp. 44-567(a)(1)(2)(b).

The Administrative Law Judge imposed liability on the Fund for the second accidental injury. The Appeals Board agrees with this finding as there is no evidence that claimant had a back impairment prior to the first accident of July 21, 1990. The respondent in its submission letter and also during oral argument before the Appeals Board, clarified that the amount which it was seeking for reimbursement from the Fund was only the amount of compensation benefits and costs accrued in reference to the second accident. The amount of compensation benefits and costs attributable to this accident totaled $30,232.64. The Fund did not object, either at the Administrative Law Judge level or before the Appeals Board, to the accuracy or appropriateness of this amount. The Administrative Law Judge in his Award also used the $30,232.64 amount in arriving at the

fifty percent (50%) apportionment Award against the Fund of $15,116.32. Accordingly, the Appeals Board finds that the amount requested by the respondent for reimbursement by the Fund only relates to the claimant's second accident of December 3, 1990.

The Appeals Board further finds that the testimony of the claimant and Dr. Prostic, as stated above, firmly establishes that the claimant was a handicapped employee, who was knowingly retained by the respondent with a preexisting impairment. Additionally, claimant's resulting disability from the December 3, 1990 accident would not have occurred but for that preexisting impairment. Therefore, all workers compensation benefits payable as a result of claimant's work-related injury of December 3, 1990, are ordered paid by the Fund. See K.S.A. 1990 Supp. 44-567(a)(1).

All other findings of Administrative Law Judge Robert H. Foerschler, in his Award dated April 25, 1994, are incorporated herein and made part hereof as specifically set forth in this order to the extent they are not inconsistent with the findings and conclusions expressed in the Award.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler, dated April 25, 1994, is hereby modified and an Award is entered as follows:

AN AWARD OF COMPENSATION IS HEREBY ENTERED IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the respondent, Stanley Steemer Carpet Cleaners, and its insurance carrier, Maryland Casualty Company, and against the Kansas Workers Compensation Fund pursuant to K.S.A. 1990 Supp. 44-567 for $30,232.64 consisting of 84 weeks of temporary total disability compensation benefits of $2,817.69, $8,190.81 of permanent partial disability benefits, $18,696.94 of medical expenses and $527.20 of deposition and hearing expenses, for a total Award against Kansas Workers Compensation Fund of $30,232.64 that is payable in one lump sum less any amounts previously paid.

All other orders of the Administrative Law Judge in his Award are herein adopted by the Appeals Board.

IT IS SO ORDERED.

Dated this ____ day of May, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Clifford K. Stubbs, Lenexa, KS
James E. Phelan, Kansas City, KS
Robert H. Foerschler, Administrative Law Judge
George Gomez, Director